FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION
Case #: MPA - 206581

PRELIMINARY RECITALS

Pursuant to a petition filed on October 13, 2022, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Medicaid Services regarding Medical Assistance (MA), a hearing was held on December 28, 2022, by telephone.

The issue for determination is whether the agency correctly denied the PA request #[redacted] for a Tobii Dynavox speech-generating device (SGD) for petitioner.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By:
Division of Medicaid Services
PO Box 309
Madison, WI 53701-0309

ADMINISTRATIVE LAW JUDGE:
Beth Whitaker
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES #) is a 12 year old resident of Dane County who lives at home with her parents and attends school.
2. Petitioner is diagnosed with Lennox Gastaut Syndrome, is wheelchair bound, has seizures, has minimal leg and arm strength is nonverbal and has a visual diagnosis of Cortical Visual Impairment (CVI) .
3. On January 19, 2016, petitioner participated in an evaluation for the Tobii Dynavox speech generating device (SGD).
4. The requesting provider provided information that a three year evaluation of the SGD was conducted on November 5, 2021, but the results of the evaluation were not submitted.
5. On November 17, 2021, an IEP meeting was held regarding petitioner.
6. On Feb 11 2022, [redacted] APNP provided medical treatment to petitioner and completed notes stating that petitioner completed a trial of an eye gaze device and is working to obtain he own Tobii SGD. The note stated that petitioner has done well with this device.
7. On April 11, 2022, [redacted] APNP prescribed the 113 SGD, EG featuring C5 – US English and TD SNAP and gaze interaction for 1-13/1-16.
8. On April 22, 2022, June 7, 2022 and July 18, 2022, the provider Tobii Dynavox LLC submitted a PA request on petitioner's behalf for an SGD with "multi methods msg/accs-sgd 1-13, SGD accessory noc- gaze interaction and SGD accessory, mounting sys – mount system."
9. An Eye Gaze Tracking Log regarding petitioner was completed at her school between March 7, 2022 and May 23, 2022 using devices other than the requested SGD.
10. On July 25, 2022, the agency denied the PA request on the basis that it was not shown to be medically necessary.
11. On October 17, 2022, the Division received petitioner's request for hearing by U.S. Mail postmarked October 13, 2022.

DISCUSSION

This matter involves a denial of a prior authorization for a Tobii Dynavox speech-generating device (SGD) along with an eye gaze accessory and a mounting system for the petitioner. The Tobii Dynavox device is considered durable medical equipment (DME), which is generally covered under Wisconsin Medical Assistance (MA). Wis. Admin. §DHS 107.24(2)(c).

Petitioner is diagnosed with a form of epilepsy called Lennox Gastaut Syndrome, is wheelchair bound, has seizures, has minimal leg and arm strength and is nonverbal. She is diagnosed with CVI, a condition in which the eyes are anatomically intact but visual functioning is impacted by delays in processing. The SGD is intended to allow her to communicate non-verbally using eye gaze because of petitioner's physical limitations and lack of motor control preclude other nonverbal communication.

Wis. Admin. Code DHS §101.03(5) defines "durable medical equipment" as, "equipment which can withstand repeated use, is primarily used for medical purposes, is generally not useful to a person in the absence of illness or injury and is appropriate for use in the home." The requested device falls under the category of DME identified as "occupational therapy assistive or adaptive equipment" and described as "This is medical equipment used in a recipient's home to assist a disabled person to adapt to the environment or achieve independence in performing daily personal functions. Examples are adaptive hygiene equipment, adaptive positioning equipment and adaptive eating utensils." See Wis. Admin. Code DHS Sec. 107.24(2)(c)1.

The department's purpose for requiring PA for certain services is to:

1. Safeguard against unnecessary or inappropriate care and services;
2. Safeguard against excess payments;
3. Assess the quality and timeliness of services;
4. Determine if less expensive alternative care, services or supplies are usable;
5. Promote the most effective and appropriate use of available services and facilities; and
6. Curtail misutilization practices of providers and recipients.

Wis. Admin. Code § DHS107.02(3)(b).

Additionally, the department considers the general criteria for approving/denying PAs:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including Medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department.

Wis. Admin. Code §DHS107.02(3)(e).

"Medically necessary" means a medical assistance service under Ch. DHS 107 that is:

(a) Required to prevent, identify or treat a recipient's illness, injury or disability; and

(b) Meets the following standards:

1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
3. Is appropriate with regard to generally accepted standards of medical practice;
4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
6. Is not duplicative with respect to other services being provided to the recipient;
7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Adm. Code. §DHS 101.03(96m).

The department denied the petitioner's PA request for Tobii Dynavox SGD on the basis that the requested DME was not shown to be medically necessary because petitioner failed to establish the effectiveness of the device for communication. It is the burden of the petitioner and the provider to show the medical necessity and appropriateness and cost effectiveness of the sought service or item. It is not the burden of the department to demonstrate the converse.

One of the specific requirements for "medical necessity" is that the requested service must be the most appropriate supply or level of service that can be safely and effectively supplied to the recipient, § DHS 101.03(96m)(b)(9), Wis. Admin. Code. The agency provided a thorough explanation of its evaluation of appropriateness:

> When considering a request for PA, the ForwardHealth Fiscal Agent must consider the appropriateness of the device requested. The term speech generating device (SGD) is given to hundreds of voice output devices commercially available that are designed to provide an effective means of verbal communication for individuals whose "natural speech" is not functional for them. The goal for using a SGD is communication, not simply hardware, software, or technology. The consumer is the ultimate end user of the SGD, and the selection of the device should not be directed by the personal preference choice presented by a given service provider. A trial should not be limited to one potential solution to a complex communication need. When selecting a SGD, the very nature of a trial is for the consumer to have an opportunity to experience and select the "right voice" for them. One could correlate this to the purchase of a car, where different makes/models are available, different options, personal choices, ease of use, etc. Devices vary in many subtle, and not so subtle, ways. When choosing a SGD, something seemingly as minor as where a power button is located on different devices could be confusing to members and/or make one device less functionally usable than another. In addition, innumerable other variables, including customer service, device specifications, the range of voices available for voice output, all could make one SGD more preferable to a consumer than another.

December 12, 2022 correspondence from Laura Ronowski, Gainwell Fiscal Agent Speech/Language Pathology Consultant.

The agency's position is that an SGD is appropriate for this petitioner, however, the particular device requested must be shown to work effectively in order to show that it is medically necessary. Petitioner did not provide information in the PA request about use of the device outside the school setting in response to the agency's request, to determine that petitioner is able to demonstration communication intent throughout the day in all environments. Petitioner's mother, [redacted], explained that the device was not made available by the vendor for trial at home because it took the position that parents are not objective and therefore it must rely on data from the school setting only.

The agency also found that the documentation of use in the 2016 evaluation did not show actual communication, with the device, rather it showed only instances of attention or gazing to the device. It concluded that the evidence showed that petitioner paid attention to something that was preferred activity but did not show that she interacted or demonstrated comprehension or communicative intent.

[redacted]'s medical note on February 11, 2022 appears to be based on the mother's report, not on data from a trial and her conclusion that petitioner did well is extremely vague. This medical note is not persuasive evidence of the effectiveness of the device.

The Eye Gaze Tracking Log for March 2022 does not appear to have involved the Tobii Dynavox SGD, which was not available to petitioner at that time. It does not demonstrate her ability to communicate through eye gaze with whatever device(s) she was using, rather it shows the duration of her focus on certain images. It is not relevant to the question of the effectiveness of the particular requested SGD.

The November 29, 2021 IEP for petitioner noted that petitioner was at that time trialing a Tobii Dynavox to determine if she was able to use eye gaze to communicate her wants needs and /or feelings. It was updated on December 21, 2022 to state that "[redacted] has successfully trialed the Tobii Dynavox and will be given a new one in the new year according to mom." It was updated again on April 13, 2022 to state that petitioner "did not have access to a Tobii Dynavox for the past few months. It turned out that the one gifted to the family was old and did not work." Petitioner's mother testified that she did have a four week trial of the requested device in December 2021, but no results of the trial were submitted as evidence.

The challenges faced by petitioner's family in obtaining equipment for home trial are acknowledged. The absence of records of the 2021 trail referred to by [redacted] and in the medical note and the IEP was not explained. Based on the evidence submitted, the agency argued that continued trial or practice/teaching is required for petitioner to demonstrate ability to use the SGD for functional communication at home and in the school.

Without evidence of effectiveness in communication by petitioner, the agency concluded that the purchase of this particular device was not justified. The consultant noted that researched has shown risk of abandonment of SGD's following purchase and that to justify the expense, the ability to successfully use the requested SGD for communication must be pre-determined. In this case, the documentation of use of the SGD did not show self-initiated communication sufficient to justify purchase.

The petitioner failed to present evidence to overturn the agency's conclusion, that the functional use of SGD to meet communication needs was not demonstrated and that it is necessary to show the device's effectiveness for communication prior to purchase in order to prove appropriateness and medical necessity. The respondent has established that this has not been demonstrated in this case, due to inadequate evidence of successful communication ability using this particular device. This is a request for a substantial expenditure that has had limited trail and inadequate evidence of effectiveness and was correctly denied based on lack of proven medical necessity.

Nothing in this Decision precludes petitioner and her provider from again seeking prior authorization for this particular or a different one, after sufficient trial.

CONCLUSIONS OF LAW

The agency correctly denied the PA request ##[redacted] for the purchase of a Tobii Dynavox SGD because petitioner has not proven medical necessity.

THEREFORE, it is ORDERED

That the petition for review is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor North, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison, Wisconsin, this 18th day of January, 2023

\s_____
Beth Whitaker
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on January 18, 2023.

Division of Medicaid Services